Supreme Court, U.S.
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No. 94-1270

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ANDREW JOHNSON, INDIVIDUALLY AND AS HEIR TO AND/OR PERSONAL REPRESENTATIVE OF THE ESTATE OF ANDREW GASTON, HIS DECEASED SON,
Petitioner,

v.

DALLAS INDEPENDENT SCHOOL DISTRICT and DONNIE BREEDLOVE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

Because no conflict exists between Circuits when interpreting the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services*, should the Court re-open the issue of governmental liability for non-state actors' conduct?

II.

May the petitioner initiate an appeal on an issue not preserved at the Court of Appeals, and if so, should the Supreme Court presume that the affirmance by the Court of Appeals of the District Court's dismissal was improper simply because the majority did not cite the Supreme Court's holding in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit?*

III.

Should the Supreme Court reconsider its long standing rule that it has no jurisdiction over state law issues that do not conflict with the United States Constitution?

LIST OF PARTIES

Counsel for Respondents certifies that the following listed persons have an interest in the outcome of this case:

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION

Respondents Dallas Independent School District and Donnie Breedlove, respectfully request that petitioner's writ of certiorari be denied, and this Court affirm the judgment of the United States Court of Appeals for the Fifth Circuit, which affirmed the judgment of the United States District Court for the Northern District of Texas, Dallas Division, dismissing petitioner's suit under Rule 12(b)(6) for failure to state a claim.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254. Respondents deny this Court has jurisdiction over petitioner's pendent state law claims.[1]

STATEMENT OF THE CASE

On October 23, 1991, petitioner's son, Andrew Gaston, was murdered by a trespasser on the campus of respondent Dallas Independent School District's A. Maceo Smith High School.[2] The trespasser, Drumestic Contreal Brown, entered A. Maceo Smith High School, instigated numerous scuffles with students, and was evicted by the students. Upon eviction, Mr. Brown pulled out a hand gun and fired indiscriminately, striking and killing Andrew Gaston. At the time Mr. Brown entered the building, the school's metal detectors were not active. Furthermore, Mr. Brown did not possess a proper school identification badge.[3]

The original suit was filed in state court. After the suit was amended to include a federal claim under 42 U.S.C. § 1983 and additional state law claims, it was removed by respondents to the United States District Court for the Northern District of Texas, Dallas Division. Upon removal, respondents immediately moved for dismissal of all claims under Federal Rule of Civil Procedure 12 (b)(6). The District Court granted respondents' motion

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[1] Respondents do not disagree with the citations of opinions below set forth by petitioner in its petition, nor does it disagree with the constitutional provisions, statutes, and rules involved in this appeal. Respondents have therefore not restated same herein.

[2] Respondent Donnie Breedlove's only alleged involvement in this cause of action was that she happened to be assigned as principal of A. Maceo Smith High School at the time of the incident. No affirmative actions or inaction with respect to petitioner's son's death are alleged against respondent Breedlove.

[3] There is no allegation by petitioner that respondent Dallas Independent School District held a statutory duty to own or utilize metal detectors or identification badges at its schools.

to dismiss on February 19, 1993. The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court on November 17, 1994.

SUMMARY OF ARGUMENT

The Court of Appeal's affirmance of the District Court's decision was consistent with other Circuits and the Supreme Court's decision in *DeShaney v. Winnebago County Department of Social Services.* As petitioner's son was murdered by a non-state actor, respondents neither created the danger nor had a constitutional duty to protect petitioner's son.

Petitioner waived any issue with respect to pleading requirements when it failed to raise the question of whether or not the district court's dismissal complied with the Supreme Court's holding in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit.* Furthermore, the Court of Appeals, *sub silentio,* applied *Leatherman* when it affirmed the District Court's dismissal for petitioner's failure to state a claim.

Petitioner's pendent state law claims should not be considered as the Court has no jurisdiction and the pendent claims are strictly local issues having no constitutional implications.

ARGUMENT AND REASONS FOR DENYING WRIT

According to Supreme Court Rule 10.1, this Court considers granting certiorari (i) when decisions of the federal courts of appeals conflict, (ii) when a federal court appellate decision conflicts with a decision of this Court, or (iii) when a federal appellate decision poses "an important question of federal law which has not been, but should be, settled by this Court." Petitioner's petition for writ of certiorari does not present any of these circumstances.

I. BECAUSE NO CONFLICT EXISTS BETWEEN CIRCUITS WHEN INTERPRETING THE SUPREME COURT'S DECISION IN *DESHANEY v. WINNEBAGO COUNTY DEPARTMENT OF SOCIAL SERVICES*, SHOULD THE COURT RE-OPEN THE ISSUE OF GOVERNMENTAL LIABILITY FOR NON-STATE ACTOR'S CONDUCT?

The petitioner seeks a writ of certiorari in order that this Court reconsider its decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989).[4] The majority below, consistent with rulings by other Circuits throughout the country, affirmed the dismissal of petitioner's claim that a school district is liable under 42 U.S.C. § 1983 for the death of a student by a non-state actor. Petitioner seeks to expand governmental liability and the due process clause under the following theories:

A. State-Created Danger Theory of Liability

Under this theory of liability, petitioner alleges that the respondents created the danger that resulted in the death

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[4] In *DeShaney*, this Court held that a state agency that returned an abused son to his father held no duty to protect the child upon his release from its custody, as the injuries were caused by a non-state actor.

of petitioner's son.[5] As the rationale for reaching this conclusion, petitioner alleges the state created the danger on the school property for petitioner's son by failing to use metal detectors. Petitioner makes a feint attempt to claim the majority below failed or refused to recognize the "state-created danger" theory of liability. However, the majority expressly cited the same language from *DeShaney* that petitioner quotes in its petition in rejecting this basis of liability, that "while the state may have been aware of the dangers that Joshua faced in the free world, it *played no part in their creation, nor did it do anything to render him any more vulnerable to them.*" [App. 7, citing *DeShaney*, 489 U.S. at 201, emphasis in Majority Opinion; see also Petition for Writ at 8].

In rejecting the same theory of liability for a student injured by a fellow student, the Eighth Circuit found that:

> In most every circuit court decision imposing § 1983 liability because the State affirmatively created or enhanced a danger, 'the immediate threat of harm has a limited range and duration,' unlike the indefinite risk created by enrolling [the student] in public school.

Dorothy J. v. Little Rock School Dist., 7 F.3d 729, 733 n.4 (8th Cir. 1993). In another analogous case, the Third Circuit denied liability of a school district with respect to injuries resulting from the conduct of another student, when it recognized that "the school defendants did not create the [petitioner's] peril, increase their risks of harm, or act to render them more vulnerable to the [attacker's] assaults." *D.R. By L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d 1364, 1374 (3rd Cir. 1992) (en banc), *cert. denied* —— U.S. ——, 113 S.Ct. 1266, 122 L.Ed.2d 662 (1993).

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[5] Petitioner's entire appeal addresses causes of action and issues regarding respondent Dallas Independent School District. As there are no apparent claims regarding respondent Breedlove on appeal, respondent does not brief issues involving her good faith immunity, etc.

The instances wherein courts have recognized a state-created danger and imposed liability have involved circumstances in which the state placed the individual in a dangerous position. *Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d 348 (11th Cir. 1989), *cert. denied*, 494 U.S. 1066, 110 S.Ct. 1784, 108 L.Ed.2d 785 (1990) (employee forced to work with dangerous convicted felons); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989), *cert. denied*, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990) (state trooper arrested the intoxicated driver of an automobile, confiscated the keys, and left a passenger stranded in a dangerous neighborhood). Contrary to these situations, the respondents in the instant case did not perform any *affirmative* act to create a danger for petitioner. The injury to petitioner was the result of an independent actor, over whom the state had no control:

> [T]here is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect residents against such predators but it does not violate the due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.

Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982). Petitioner failed to plead any fact, nor could it, to support a claim that the respondents *created* the danger for petitioner.

B. Special Relationship Theory

Petitioner's second theory for expanding governmental liability in this situation is the existence of a "special relationship" between petitioner's son and respondents. This theory has been uniformly rejected by all the Circuits when applied to facts akin to those presented by petitioner.

The courts have recognized a "special relationship" theory of liability for injuries resulting from conduct of a non-state actor in limited circumstances. *See Youngberg v. Romeo*, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982) (mental patients); *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) (prisoners).[6] In each instance, the facts included a *custodial relationship*, wherein the state had complete control over the victim's liberty. The theory that a public school system has such a custodial relationship with students has been reviewed and consistently dismissed by the different circuits. *Black by Black v. Indiana Area School Dist.*, 985 F.2d 707, 713 (3rd Cir. 1993) (no special relationship where parents remain the primary caretakers of their children); *J.O. v. Alton Community Unit School Dist. 11*, 909 F.2d 267, 272 (7th Cir. 1990) (no affirmative constitutional duty to protect).

Petitioner's claim of a "special relationship" is premised on the compulsory school attendance laws of the state. This claim was most recently rejected by the Eleventh Circuit, which held:

> To date, every federal circuit court of appeal to address the question of whether compulsory school attendance laws create the necessary custodial relationship between school and student to give rise to a constitutional duty to protect students from harm by non-state actors has rejected the existence of any such duty. *See Dorothy J. v. Little Rock School Dist.*, 7 F.3d 729 (8th Cir. 1993); *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364 (3rd Cir. 1992) (en banc), *cert. denied*, —— U.S. ——, 113 S.Ct. 1266, 122 L.Ed.2d 662 (1993); *Maldonado v. Josey*, 975 F.2d 727 (10th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 1266, 122

[6] The Eleventh Circuit recently held that a *residential student* at a Georgia School for the deaf created a special relationship, but distinguished the facts from *nonresidential* student cases. *Spivey v. Elliott*, 29 F.3d 1522, 1525 (11th Cir. 1994).

L.Ed.2d 662 (1993); and *J.O. v. Alton Community Unity School Dist. 11*, 909 F.2d 267 (7th Cir. 1990). According to these circuits, mere compulsory attendance laws do not result in the level of custody envisioned by the Supreme Court in *DeShaney*. These circuits reasoned that mandatory attendance at a public high school simply does not restrict one's liberty in the same sense that incarceration in prison or involuntary commitment in a mental institution does. *Wright v. Lovin*, 32 F.3d 538 (11th Cir. 1994). By enacting a compulsory attendance statute, a state does not create a constitutional duty to shield students from any and all harm.

Petitioner contends that the majority opinion contradicts a duty imposed by previous Fifth Circuit decisions, citing *Lopez v. Houston Independent School District*, 817 F.2d 351 (5th Cir. 1987) (injury on a bus), and *Horton v. Goose Creek Independent School District*, 690 F.2d 470 (5th Cir. 1982) (canine contraband search). Of course, these cases are not analogous, as the Court of Appeals did not have *DeShaney* (1989) as guidance when it issued these decisions. Even without *DeShaney*, the Fifth Circuit denied liability against the school district in *Lopez*, and only held against the school district in *Horton* because it was the school district which *initiated* the search, and thus state actors were involved.

II. MAY THE PETITIONER INITIATE AN APPEAL ON AN ISSUE NOT PRESERVED AT THE COURT OF APPEALS, AND IF SO, SHOULD THE SUPREME COURT PRESUME THAT THE AFFIRMANCE BY THE COURT OF APPEALS OF THE DISTRICT COURT'S DISMISSAL WAS IMPROPER SIMPLY BECAUSE THE MAJORITY DID NOT CITE THE SUPREME COURT'S HOLDING IN *LEATHERMAN v. TARRANT COUNTY NARCOTICS INTELLIGENCE AND COORDINATION UNIT*?

It is this Court's customary practice to "refrain from addressing issues not raised in the Court of Appeals." *E.E.O.C. v. Fed. Labor Relations Auth.*, 476 U.S. 19,

25, 106 S.Ct. 1678, 1681, 90 L.Ed.2d 19 (1986). The Supreme Court has often declined to consider issues raised for the first time in a petition for certiorari. *United States v. Ortiz*, 422 U.S. 891, 899, 95 S.Ct. 2585, 2589, 45 L.Ed.2d 623 (1975).

Petitioner claims the United States Court of Appeals failed to follow *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, —— U.S. ——, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), when affirming the dismissal of petitioner's suit.[7] *Leatherman* was issued one month *after* the District Court issued its decision, and seven months *prior* to oral argument before the Fifth Circuit. The issue of *Leatherman* was first brought forth by petitioner on or about October 4, 1993, three days before oral argument, via a letter to the Clerk of the Court. Although *Leatherman* was issued over one month before petitioner filed its Brief of Appellant, the issue of *Leatherman* (pleading requirements) does not appear. *See generally*, Brief of Appellant.

The Court of Appeals was well aware of the *Leatherman* decision at the time of oral argument and when its decision was issued in this case, having cited it numerous times prior to its affirmance of the case at bar.[8] *See Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994); *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 504 (5th Cir. 1994); *Foster v. City of Lake Jackson*, 28 F.3d 425, 428 (5th Cir. 1994); *Tompkins v. Vickers*, 26 F.3d 603, 608 (5th Cir. 1994); *Cinel v. Connick*, 15 F.3d 1338, 1342 (5th Cir. 1994), *cert. denied*, —— U.S. ——, 115 S.Ct. 189 (1994).[9] The Court of Appeals considered the plead-

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[7] In *Leatherman*, this Court struck down the "heightened pleading" requirement for § 1983 causes of action.

[8] Respondent's counsel even received questioning from Appellate Judge Duhé about the effects of *Leatherman* during oral argument.

[9] Moreover, *Leatherman* was an appeal from the Fifth Circuit, and two of the three appellate members involved in the *Leatherman* appeal were members of the panel in this case. See generally,

ings under *Leatherman*, and found, *sub silentio*, that there were no grounds for reversal. Even the dissenting opinion, which cites *Leatherman*, never claims the majority did not consider *Leatherman*. (App. 17).

Even under *Leatherman*, petitioner's pleadings fail to state a constitutional deprivation. The Court of Appeals properly affirmed the District Court's dismissal because "it appears 'beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Haines v. Kerner*, 404 U.S. 519, 520-21, 92 S.Ct. 594, 596, 30 L.Ed.2d 652 (1972) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). (App. 3).

In addition, a § 1983 complaint must state *facts*, not conclusions. *Angel v. City of Fairfield*, 793 F.2d 737, 739 (5th Cir. 1986). As there are no facts which can be pled in this case to give rise to a constitutional deprivation, the Court of Appeals was correct in affirming the District Court's dismissal. This case is simply one of tort, not constitutional dimensions. *See, e.g., Fee v. Henderson*, 900 F.2d 804, 810 n.9 (5th Cir. 1990).

It is clear, even if the conclusions as pled occurred, negligence *alone* will not support a federal constitutional claim against a school district. *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Neither the text nor the history of the due process clause supports petitioner's view that a school district's duty to provide its students with a safe environment is a component of the due process clause. *See Collins v. Harker Heights, Texas*, —— U.S. ——, 112 S.Ct. 1061, 1069, 117 L.Ed.2d 261 (1992). In order to have a violation of § 1983, the petitioner had to plead the violation of a specific constitutional provision. Although § 1983 provides a "citizen with an effective remedy against those

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***Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054 (5th Cir. 1992).**

abuses of state power that violate federal law, it does not provide a remedy for abuses that do not violate federal law." 112 S.Ct. at 1065.

Petitioner includes in its Petition for Writ numerous excerpts from its pleadings. Each excerpt lists *conclusions*, not facts (i.e., "a well recognized history of violent conduct. . . ."). (Tr. pp. 32, 33; Petition for Writ of Certiorari, at 15). As petitioner cannot get past the hurdle of either a constitutional deprivation or a duty owed to petitioner's son, no facts could support anything but the affirmation of the District Court's decision by the Court of Appeals.

Petitioner argues that the majority decision's refusal to infer the existence of a dangerous environment as a result of the respondent DISD's ownership of metal detectors and issuance of ID badges is reversible error. Utilizing petitioner's logic, requiring food service workers to wash their hands infers they have typhus or some other communicable disease, or that the installment of fire alarms and sprinkler systems infers a fire trap. As intelligently reasoned by the majority opinion, "[n]o inference of dangerousness arises simply from the presence of student ID badges or metal detectors; such devices could have been installed prophylactically. . . ." (App. 8). Like sanitation measures or fire prevention methods, it would be illogical to infer that every safety precaution infers a present or past danger. Furthermore, "[e]ven if the deployment of such security measures was haphazard or negligent, it may not be inferred that the conduct of the defendants rose to the level of deliberate indifference." (App. 9). Petitioner's pleadings, under any examination, including *Leatherman*, fails to rise to the level of a constitutional deprivation.

III. SHOULD THE SUPREME COURT RECONSIDER ITS LONG STANDING RULE THAT IT HAS NO JURISDICTION OVER STATE LAW ISSUES THAT DO NOT CONFLICT WITH THE UNITED STATES CONSTITUTION?

Petitioner has requested that this Court review the decisions by the local District Court and Court of Appeals with respect to the application of purely local law to petitioner's pendent claims. It is this Court's practice to accept the reasonable construction of state law by lower courts "even if an examination of the state-law issue without such guidance might have justified a different conclusion." *Bishop v. Wood*, 426 U.S. 341, 346, 96 S.Ct. 2074, 2078, 48 L.Ed.2d 684 (1976). See also, *Haring v. Prosise*, 462 U.S. 306, 315 n.8, 103 S.Ct. 2369, 2373 n.8, 76 L.Ed.2d 595 (1983); *Chardon v. Fumero Soto*, 462 U.S. 650, 655 n.5, 103 S.Ct. 2611, 2615 n.5, 77 L.Ed.2d 74 (1983); *Pierson v. Ray*, 386 U.S. 547, 558 n.12, 87 S.Ct. 1213, 1220 n.12 (1967).

This Court is urged not to change its tradition, and open the floodgates to state law construction issues. As this Court so eloquently explained:

> Normally, however we defer to the construction of a state statute given it by the lower federal courts. We do so not only to 'render unnecessary review of their decisions in this respect,' but also to reflect our belief that district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States.

Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 500, 105 S.Ct. 2794, 2800, 86 L.Ed.2d 394 (1985), citations omitted. Petitioner has requested this Court review the lower courts' decisions with respect to a school district's state immunities and alleged state contract law claims. These local matters certainly do not merit Supreme Court review, as they have absolutely no impact on the nation, and are best reserved for the local courts who are most familiar with the plethora of state law precedent.

CONCLUSION

The United States Court of Appeals for the Fifth Circuit's affirmance in this case is consistent with all other circuits' decisions and this Court's decision in *DeShaney v. Winnebago County Department of Social Services.* As the issue of government's liability for the conduct of non-state actors is well settled, petition for certiorari should not be granted. With respect to petitioner's claims that this Court should remand this case in light of *Leatherman*, petitioner failed to raise this question at the Court of Appeals, cannot show the Court of Appeals did not consider *Leatherman*, and, regardless, failed to state a claim of action under any pleading standard. Finally, there are no grounds for this Court to reconsider its long standing rule that it does not review pendent state law claims. As such, there are no special or important reasons for granting petitioner's writ of certiorari. Respondents pray that this Court deny petitioner's writ and grant respondents such further relief to which this Court deems respondents entitled, at law or in equity.

Respectfully submitted,

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